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NO. 83-297

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1983

ARMCO, INC.,

Appellant,

v.

DAVID C. HARDESTY, JR.
State Tax Commissioner of West Virginia

Appellee

ON APPEAL FROM THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

APPELLEE'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

The appellee respectfully disagrees with the appellant's presentation of the questions raised by the appeal and feels the following more fairly repesents the questions presented for review:

1. Whether sufficient nexus exists with regard to appellant's sales to West Virginia customers to allow West Virginia, consistent with Due Process Clause and Commerce Clause requirements, to impose its business and occupation privilege tax on appellant's in-State selling activities.

2. Whether the principles of the unitary business concept are appropriate in determining whether a corporation has entered a state in such a fashion that

nexus with regard to any one of its activities may be determined based upon its overall in-state operations.

3. Whether the imposition of the West Virginia business and occupation tax upon appellant's business activity of making wholesale sales in West Virginia discriminates against interstate commerce.

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STATEMENT OF THE CASE

Armco, Inc., is an Ohio corporation qualified to hold property and do business as a foreign corporation in the

State of West Virginia (J.A. 20). During the period in question, January 1, 1970, through December 31, 1975, Armco carried on extensive business activities in West Virginia resulting in its payment of tax under the following business and occupation tax classifications: coal production (Chapter 11, Article 13, Section 2a, of the West Virginia Code of 1931, as amended); retail sales (Code 11-13-2c); wholesale sales (Code 11-13-2c); contracting (Code 11-13-2c); and furnishing property for hire (Code 11-13-2i). (R. Transcript-State's Exhibit No. 3.) Armco acknowledged its in-State presence and taxability in the above areas but objected to the imposition of tax on wholesale sales made to West Virginia customers by certain of its internal divisions. Armco contended that the operations of those divisions when viewed separately from its

total in-State business did not have sufficient nexus with West Virginia.

Armco divides its organization into operating groups or divisions. Among those groups, separate manufacturing divisions are responsible for the marketing and sale of that division's products. Three manufacturing divisions made the wholesale sales at issue to West Virginia customers during the period involved. (J.A. 16.) The divisions are: Steel Group; Union Wire Rope; and Metal Products.

The Steel Group manufactures practically all steel mill products with emphasis on high quality steels for specific needs. (J.A. 16.) None of the Steel Group's manufacturing facilities are located in West Virginia. (J.A. 16.) The Steel Group has district sales offices in

Cincinnati, Ohio, and Pittsburgh, Pennsylvania, that have responsibility for territories which include portions of West Virginia. During the audit period appellant's Steel Group Division employed four salesmen who solicited business within West Virginia. Such salesmen entered this State as often as twice a month to consult with clients concerning products available from appellant and possible future needs. (J.A. 18-19.) Though not normal business procedure, such salesmen at times received orders from in-State customers on behalf of Armco. (J.A. 20.) After a customer's order was filled, Armco's sales representatives made follow-up calls to check customer satisfaction with the quality of the products sold and to solicit future orders. (J.A. 21.) In addition, occasionally representatives of the Steel

Group were called upon to investigate client complaints and perform service work within West Virginia. (J.A. 17.)

The Union Wire Rope Division produces wire rope slings and accessories at its mill facilities in Kansas City. (J.A. 16.) Wire Rope has three salesmen having responsibilities in West Virginia. Those salesmen are associated with Wire Rope's offices in Ashland, Kentucky, Pittsburgh, Pennsylvania, and Greensboro, North Carolina, and made one or two trips a month to West Virginia to consult with customers. (J.A. 19.)

The Metal Products Division produces and sells construction products, corrugated metal pipe, retaining wall, guard rail, plastic sewer pipe, floodgates, buildings, and so forth. (J.A. 16.) Said division maintains office facilities

at South Charleston, West Virginia, from which its employees solicit sales from customers throughout West Virginia. (J.A. 23.) The South Charleston office has responsibility for selling all of the Metal Products Division's products except metal buildings. (J.A. 24.) Armco created a separate department within the Metal Products Division through which the sale of metal buildings are handled in cooperation with franchise agents. (J.A. 24.) The franchise agents are West Virginia residents operating businesses in this State. (J.A. 27-28.) Armco allows said agents to whom it makes wholesale sales to display its corporate name and trademark at their place of business and in advertisements. Additionally, Armco shares advertising expenses with its agents to promote sales to ultimate customers.

All sales by any of Armco's divisions are subject to acceptance at Armco's home office at Middletown, Ohio. (J.A. 20.) Goods are generally shipped to West Virginia customers by common carrier, truck or rail. (J.A. 20.) Title to such goods under Armco's conditions of sale passes to the customer upon delivery to the carrier at the point of shipment. (J.A. 22.)

Assessment was made against Armco in 1977 for business and occupation taxes for the years 1970 through 1975 based on its total wholesale sales made to West Virginia customers. Such assessment was affirmed, less penalty, by the West Virginia State Tax Commissioner in his administrative decision issued December 10, 1977. Armco appealed the Tax Commissioner's administrative decision to the

Circuit Court of Kanawha County where the decision was overruled and the assessment vacated.

The Kanawha County Circuit Court found there was insufficient nexus to support the business and occupation tax assessed. Such decision was based upon the court's finding that Armco's in-State selling activities did not constitute a substantial enough nexus. The Court further held that the nexus required must be between the state and the activity or transaction in question and not merely between the state and other business activities of the taxpayer.

The West Virginia State Tax Commissioner appealed the Kanawha County Circuit Court's decision to the Supreme Court of West Virginia. In an opinion issued May 25, 1983, the West Virginia

Supreme Court reversed the Circuit Court and found there was sufficient nexus to support the taxation of the sales at issue. Such decision was based upon the Court's finding that Armco was a unitary business corporation conducting its business activity under one corporate umbrella. As a unitary business the Court concluded that the question of nexus must be resolved by examination of the full scope of Armco's in-State business operations and not by separate inquiry into each of its transactions.

SUMMARY OF ARGUMENT

The primary issue in this appeal involves the proper interpretation and application of constitutional nexus requirements in adjudging the validity of West Virginia's direct taxation of appellant's interstate selling activities.

Constitutional nexus considerations relate to both Due Process Clause and Commerce Clause requirements.

The Due Process Clause nexus restriction holds that a state may levy a tax on interstate business if there is a "minimal connection" between the taxing state and the income producing activities. Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1968). The requisite minimal connection has been defined as a definite link between a state and the person, property or transaction it seeks to tax. National Bellas Hess Inc. v. Department of Revenue, 386 U.S. 753 (1967).

Preceding this Court's decision in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), states could not directly tax the privilege of conducting interstate business. A state could indirectly

tax an interstate activity only when there was an associated intrastate business which could serve as the incidence of the tax. The taxpayer's interstate business was the subject of the tax, but a portion of the taxpayer's interstate receipts could be included in the measure of the tax when the taxpayer's interstate and intrastate businesses were sufficiently related. Spector Motor Services, Inc. v. O'Connor, 340 U.S. 602 (1951). However, no portion of the interstate receipts could be attributed to the intrastate activity if the interstate business was shown to be disassociated from local business. Norton Co. v. Department of Revenue of the State of Illinois, 340 U.S. 534 (1951).

Due process nexus considerations at the time of Spector, and Norton, involved

an examination of the connection between a taxpayer's intrastate and interstate business. Interstate business could be indirectly taxed only when such interstate business was sufficiently associated with the taxpayer's local business. If a disassociation from intrastate business could be shown, the interstate activity lacked a minimal local connection with the taxing state and could not, consistent with due process requirements, be taxed.

Since interstate business activity is now subject to direct state taxation, there no longer has to be an associated intrastate activity upon which to base the tax. The circumstances Norton's disassociation test, supra, was designed to identify are no longer relevant, inasmuch as interstate business can now supply its own due process minimal connection. The

local aspects of an interstate business now permit its taxation regardless such business' disassociation from the taxpayer's intrastate business.

Due process nexus should be viewed as simply a threshold requirement used to determine whether there is any minimal connection which affords the state the jurisdiction to tax. In the instant case, the in-State presence of appellant's sales representatives, in furtherance of its sales to West Virginia customers, more than establishes the minimal connection necessary to satisfy due process nexus considerations.

Commerce Clause nexus requirements examine the sufficiency of the in-state portion of an interstate activity to determine whether a state may impose a tax on said interstate business. In

adjudging the sufficiency of the local activity, this Court has examined the in-state activity in relation to the incidence of the tax. When examining the propriety of taxes levied on the privilege of selling, this Court has consistently upheld the state tax when the in-state activity was substantial with relation to the establishment and maintenance of sales. General Motors Corp. v. Washington, 377 U.S. 436 (1964).

Appellant's in-State activities in this case involve solicitation activities by seven sales representatives. Such representatives were available to advise prospective customers of appellant's line of products and to make recommendations and provide advice concerning a customer's specific product needs. After a sale was consummated, the sales representatives made follow-up calls to check

customer satisfaction, investigate complaints and perform necessary service work. Appellant's in-State business activities, which are clearly essential to the establishment and maintenance of sales and make possible the continuance of valuable contractual relationships, are sufficient to satisfy Commerce Clause nexus requirements. See, Standard Pressed Steel Co. v. Department of Revenue of Washington, 419 U.S. 560 (1975).

The Commerce Clause nexus standard has also been viewed in terms of the tax bearing a fair relation to services provided by the taxing state. In the case of a unitary business, such as appellants, all aspects of such business contribute to all other aspects. Therefore, the nexus sufficient to tax any one aspect must be reviewed in terms of the total activities of the taxpayer within

the state. Only by considering a taxpayer's total activities can an accurate assessment be made of whether the taxpayer is being subject to the tax commensurate with the benefits it is receiving from the taxing state.

The West Virginia Supreme Court of Appeals' decision correctly utilizes the unitary concept when applying the Commerce Clause's nexus standard to appellant's disputed in-State selling activities. Appellant's West Virginia selling activities are clearly a part of its integrated business and as such should be viewed in conjunction with the full scope of its in-State operations to determine whether appellant is receiving State services and benefits which correspond with the amount of tax imposed upon its in-State activities. The appellee submits that the record plainly reveals that

appellant's State taxation is commensurate with its in-State activities.

The second issue in this appeal involves an alleged discrimination against interstate commerce by virtue of West Virginia's exemption from the payment of the State's wholesale sales business tax those sales of products previously taxed pursuant to the manufacturing privilege tax. Appellant contends that since an out-of-State manufacturer has to pay wholesale sales tax, while the in-State manufacturer does not, there is a discrimination against interstate commerce in violation of the Commerce Clause.

Appellee submits that the State's wholesale privilege tax system is not discriminatory when assessed in light of its actual effect considered in

conjunction with other provisions of the State's tax scheme. See, Maryland v. Louisiana, 451 U.S. 725 (1981). A West Virginia manufacturer is exempt from the wholesale sales tax, imposed at the rate of .27 percent, only if he has paid tax on manufacturing at the rate of .88 percent. When one considers the in-State manufacturer's tax burden is 300 percent greater than that of the out-of-State wholesaler, West Virginia's tax system cannot be said to discriminate against interstate commerce.

ARGUMENT

I.

WEST VIRGINIA'S TAXATION OF APPELLANT'S IN-STATE SELLING ACTIVITIES IS CONSISTENT WITH NEXUS REQUIREMENTS GOVERNING THE PERMISSIBLE TAXATION OF INTERSTATE BUSINESS.

A. INTRODUCTION

Chapter 11, Article 13, Section 2 and 2c, of the West Virginia Code of 1931, as amended, jointly levy a privilege tax on sellers of property and provide that the said business and occupation tax is to be imposed, "Upon every person engaging or continuing within this State in the business of selling any tangible property." (Emphasis supplied.) West Virginia's privilege tax levies on the business of selling and not on the sale itself. Therefore, appellant's persistent reference to West Virginia's taxation of out-of-State sales is misleading and inaccurate.

Appellee concedes that certain mechanical aspects of the sales at issue, such as the technical passage of title,

occur outside of West Virginia. However, appellee submits that such aspects have little bearing on where the business of selling occurs. There are numerous activities associated with the business of selling other than the passage of title. It is those business activities which surround the sale which form the subject of West Virginia's privilege tax and when such activities occur in-State, imposition of the tax is proper. Appellant's selling activities in West Virginia are a matter of record and clearly constitute engaging in the business of selling in the State.

Appellant in connection with the operation of its Steel and Union Wire Rope divisions made use of at least seven (7) sales representatives to systematically cover the entire State of West Virginia in search of prospective

clients. These representatives, while soliciting sales for the appellant, were available to advise prospective customers of appellant's line of products and to make recommendations and provide advice concerning a specific customer's product needs. For example, the Steel Group Division regularly made sales of customized products tailored to a customer's specific needs. (J.A. 16.) At times the sales representatives obtained orders on behalf of the appellant. (J.A. 20.) After a sale was consummated, the sales representatives made follow-up calls to check customer satisfaction, and in the event of customer complaints, appellant sent personnel in State to investigate such complaints and perform necessary service work. (J.A. 17, 21.) The sales at issue by appellant's Metal Products Division

were made to appellant's franchise agents. In accordance with the agreement of sale, the appellant allowed such agents to make use of its trademark and trade name to facilitate sales to ultimate customers. Appellant also participated in joint promotional activities with its franchisees.

Appellant's employment of salesmen in West Virginia whose sole function was the establishment and maintenance of the sales at issue clearly amounts to engaging in the business of selling within the State as contemplated by West Virginia's business and occupation tax laws. The sole inquiry presented to this Court is whether such business activities are sufficient to allow taxation consistent with constitutional nexus requirements. Nexus standards relate to both Due Process Clause and Commerce Clause requirements. Separate examination of the nexus

criterion relevant to each of those constitutional provisions will give this Court a clearer perception of the issue in this case.

B. DUE PROCESS CLAUSE CONSIDERATIONS

The first constitutional question in determining the propriety of a tax on interstate transactions is whether Due Process Clause requirements have been satisfied. In Commonwealth Edison Co. v. State of Montana, 453 U.S.609 (1981), this Court recognized that states have wide latitude in imposing revenue taxes like West Virginia's business and occupation tax. The Court noted that revenue taxes unlike "user" taxes were not imposed by the state for the use of state-owned or maintained facilities, and there was no due process requirement that taxes

collected from a particular activity must be reasonably related to the value of services provided to that activity. This Court then quoted the following general rule:

> "'Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied.
>
> "'A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve abandonment of the most fundamental principle of government --that it exists primarily to provide for the common good.' Carmichael v. Southern Coal & Coke Co., 301 US 495, 521-523, 81 L

> Ed 1245, 57 S Ct 868, 109 ALR 1327 (1937) (citations and footnotes omitted)." 453 U.S. at 622.

The nexus requirement with regard to due process restrictions on a state's power to tax income generated by the activities of an interstate business, is set out in Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978) as follows:

> "First, no tax may be imposed unless there is some minimal connection between those activities and the taxing State. National Bellas Hess, Inc. v. Department of Revenue, 386 US at 753, 756, 18 L Ed2d 505, 87 S Ct 1389. * * * Id., 437 U.S. at 273.

The due process nexus restriction holds that a state may levy a tax on interstate business if there is a "minimal connection" between the state and the income producing activities. National Bellas Hess, Inc. v. Department of

Revenue, 386 U.S. 753 (1967) defined minimal connection as a definite link between a state and the person, property or transaction it seeks to tax.

In the instant case, West Virginia is taxing appellant's income earned from an interstate sale of products. Appellant's wholesale sales at issue were generated from in-State (West Virginia) contacts by its sales representatives. Such in-State presence of the person of the appellant, through its sales representatives, in furtherance of its business transactions more than establishes the minimal connection necessary to accord the State of West Virginia the right to levy its business and occupation tax.

The due process nexus standard clearly only requires that there be some

type of local incident upon which the state can base its jurisdiction to tax. In fact, in Mobil Oil Corp. v. Commissioner of Taxes of Vermont, 445 U.S. 425 (1980) this Court determined due process nexus requirements satisfied as follows:

> "The requisite 'nexus' is supplied if the corporation avails itself of the 'substantial privilege of carrying on business' within the state; and '(t)he fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction.' Wisconsin v. J. C. Penney Co., 311 U. S. 433, 444-445 (1940)" Id.

Appellants' selling activities carried on in West Virginia supply the State the nexus to tax, and it is immaterial that certain aspects of the sales at issue occur outside the State.

One of the first cases dealing with the taxation of interstate commerce which considered due process nexus standards was Norton Co. v. Department of Revenue of the State of Illinois, 340 U.S. 534 (1951). In that case the State of Illinois attempted to indirectly tax interstate sales made by Norton Company to Illinois residents. Illinois sought to include in the measure of its intrastate privilege tax, receipts attributable to Norton's wholly interstate business. The Court determined that when such sales involved orders sent directly to Norton's out-of-state headquarters by the Illinois customer and shipped directly to the customer from said headquarters, there was no local incident upon which to base the tax. The Court further pointed out that even if the sales at issue resulted from in-State solicitation by Norton Co.

through sales representatives based outside Illinois, the nexus to tax would still be lacking. The Court stated:

> "Where a corporation chooses to stay at home in all respects except to send abroad advertising or drummers to solicit orders which are sent directly to the home office for acceptance, filling, and delivery back to the buyer, it is obvious that the State of the buyer has no local grip on the seller. Unless some local incident occurs sufficient to bring the transaction within its taxing power, the vendor is not taxable. McLeod v. Dilworth Co., 322 U.S. 327. Id. at 537.

Analysis of the Norton, decision supra, should begin by reviewing the scope of permissible state taxation of interstate commerce at the time Norton was decided. In 1951, Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602 (1951) prohibited a state from directly taxing the privilege of conducting

interstate business. States could reach an interstate activity only when there was an intrastate business which could serve as the incidence of the tax. The state then could, within reasonable limits, compute the amount of tax by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate revenues. See, International Harvester Co. v. Evatt, 329 U.S. 416 (1947) and Interstate Pipe Line Co. v. Stone, 337 U.S. 662 (1949).

The general prohibition against the direct taxation of interstate commerce certainly was reflected in the Court's examination of due process nexus standards in Norton, supra. An interstate transaction could only be indirectly taxed by including of a portion of the interstate receipts in the measure of an

intrastate tax. If the interstate activity was disassociated from the taxpayer's intrastate business, due process prevented the state from including any interstate receipts in the measure of the local tax. Since a wholly interstate activity could not be subject to direct taxation, the in-state portion of that activity could not provide the minimal connection necessary to satisfy due process nexus requirements. The Court viewed an activity in interstate commerce as separated from local business. Therefore, an interstate activity by itself could never provide the nexus necessary to satisfy due process considerations.

The sales at issue in Norton, supra, originated from customer orders to Norton's out-of-state headquarters and were thus directly involved in interstate commerce. Such sales therefore had no local

incident upon which to base the tax. The Court's rationale was even more clearly apparent when it extended its holding to solicitation sales. Since a corporation's solicitation of orders via itinerant sales representatives was a purely interstate activity, the activities of those representatives in the taxing state could not be considered as supplying the local connection necessary to tax. Interstate business activities were accorded not only an immunity from direct state taxation but were shielded from a proper scrutiny of the local aspects of such activities.

This Court is well aware that Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) eliminated the general prohibition against the direct taxation by a state of interstate commerce. Such decision established that a state may

directly tax the privilege of conducting interstate business under appropriate conditions. An interstate activity no longer need be associated with an intrastate business to be taxable.

In light of Complete Auto, supra, the appellee asserts that the Norton, decision, supra, must be reevaluated. Since purely interstate business activities may now be subject to state tax, the local aspects of such business must be examined to determine whether due process nexus requirements have been satisfied. The disassociation test of Norton must be restructured to conform with current principles of state taxation.

Norton held that activities may not be taxed consistent with due process if such activities are disassociated from local business and interstate in nature.

The appellee submits that such principle is only valid today when restricted to an examination of whether the interstate activity subject to tax has any in-state aspects upon which the state can base its jurisdiction to tax. When there is a definite link between the state and the interstate activity, due process nexus is satisfied. Only when there is no in-state connection between the transaction and the taxing state is due process nexus absent.

In the instant case, appellant's in-State solicitation activities, though a part of interstate commerce, more than provide the minimal connection necessary to satisfy the Due Process Clause. Only if there were no in-State activity connected with the interstate sales would due process preclude West Virginia from taxing the sales at issue. The due

process nexus test should be thought of as a threshold test which requires only a minimal local connection to justify a state tax. Such a limitation may seem minor, however, it was just that lack of minimal connection which was the decisive factor in American Oil Co. v. Neill, 380 U.S. 491 (1965).

In American Oil the State of Idaho attempted to tax a sale of gasoline which occurred wholly in the State of Utah. The facts of the case clearly demonstrated that every phase of the sales transaction, from the initial negotiations to the completed delivery, occurred outside of Idaho. The Court concluded that there was simply no in-state activity connected with the out-of-state sales transactions upon which to base the tax.

Likewise, the Due Process Clause should be interpreted as only prohibiting the State of West Virginia from imposing its privilege tax on an interstate activity completely independent of the State. For example, due process would preclude West Virginia from the privilege taxation of a business activity which occurred wholly out of State. However, when a corporation avails itself of the substantial privilege of conducting a portion of its interstate business in West Virginia, due process is satisfied. See, Mobil Oil, supra.

The Norton, decision supra, should be viewed by this Court in the context in which it was written. Interstate commerce was not subject to direct state taxation. The local aspects of the interstate activity itself could, therefore, not provide the due process minimal

connection necessary to afford a state the jurisdiction to tax. The interstate activity was only indirectly subject to state taxation when there was an associated intrastate business which could serve as the incidence of the tax and supply the requisite minimal local connection. Courts, therefore, focused their examination on whether there was an intrastate activity to provide the necessary local incident and whether there was a sufficient connection between the taxpayer's intrastate and interstate business activities. The disassociation concept of Norton, supra, was designed to determine whether the interstate activity was sufficiently connected with an intrastate activity of the taxpayer to permit the inclusion of interstate receipts in the measure of the intrastate tax. If there were not sufficient connection, the

interstate activity was said to be disassociated from the local business and the minimal local connection necessary to satisfy due process requirements was absent.

Since interstate business activity is now subject to direct State taxation, there no longer has to be an associated intrastate activity. The local portion of the interstate business can now supply its own due process minimal connection. An interstate activity with sufficient local aspects is taxable regardless of its disassociation from the taxpayer's other in-state business. Since the circumstances which the Norton, disassociation test supra, was designed to identify are no longer relevant, the disassociation principle's function is of limited utility. The disassociation concept should operate, with respect to the

current scope of state taxation of interstate commerce, only to ensure that there are sufficient local aspects of the interstate business activity to supply the due process minimal connection. See, American Oil, supra.

Due process nexus should be viewed as a threshold requirement used to determine whether a corporation has subjected itself to the taxing power of the state. If its activities provide a definite link between the corporation and the state, a minimal connection which affords the state the jurisdiction to tax is established. See, Miller Bros. Co. v. Maryland, 347 U.S. 340 (1954). In the current case, each of appellant's divisions, which make sales to West Virginia customers, utilizes personnel within West Virginia to solicit those sales. The in-State presence of the appellant in

furtherance of its selling activities more than affords West Virginia the jurisdiction to tax such activities in accordance with due process requirements. See, Scripto Inc. v. Carson, 362 U.S. 207 (1960).

C. COMMERCE CLAUSE NEXUS CONSIDERATIONS

An examination of the Commerce Clause limitations on the power of a state to tax interstate commerce should be initiated with certain general principles in mind. In Commonwealth Edison, supra, this Court placed the Commerce Clause constitutional protections of interstat commerce in proper perspective. This Court stated the following:

> "There is no reason to suppose that this latitude afforded the States under the Due Process Clause is somehow divested by the Commerce Clause

> merely because the taxed activity has some connection to interstate commerce; particularly when the tax is levied on an activity conducted within the State. 'The exploitation by foreign corporations [or consumers] of intrastate opportunities under the protection and encouragement of local government offers a basis for taxation as unrestricted as that for domestic corporations.' [Citations omitted] * * *" Id., 453 U.S. at 623.

This Court based the above declaration on its long-standing position that it was not the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their just share of state tax burdens. Concurrently, this Court in Complete Auto Transit, Inc. v. Brady, supra, has recognized that a state has a significant interest in exacting from interstate commerce its fair share of the cost of state government. Therefore, the Commerce Clause's constitutional concern in state taxation is simply

whether a state is making a fair demand of that aspect of interstate commerce to which the state bears a special relation. Traditionally, the Commerce Clause has impinged on a state's levy of tax only when such tax discriminates against or prohibits interstate activities or places interstate commerce at a disadvantage relative to local commerce. See, Central Greyhound Lines v. Mealey, 344 U.S. 653 (1948). If no such discriminatory effect exists, the state is free to pursue its own fiscal policies unembarrassed by the United States Constitution.

In the present case, this Court is examining a privilege tax which the appellant submits offends the Commerce Clause when applied to its activities due to insufficient nexus. Such contention not only ignores the realities of the appellant's West Virginia business

operations but also completely misinterprets the purpose and scope of the Commerce Clause's protection of interstate activities. This Court has repeatedly acknowledged that all state tax burdens do not impermissibly impede interstate commerce, and the Commerce Clause balance tips against the state tax only when it unfairly burdens commerce by exacting from the interstate activity more than its just share of the cost of state government. See, Washington Revenue Dept. v. Association of Wash. Stevedoring Cos., 437 U.S. 734 (1978).

Determination of whether the state is exacting from an interstate activity a just share of the cost of government has focused on an examination of the in-state aspects of the interstate business. If the local portion of the interstate activity is of sufficient substance, the

state may tax directly the privilege of conducting the interstate business. The sufficiency of the local activity is of course the nexus requirement. The nexus requirement of the Commerce Clause is virtually identical to that of the Due Process Clause. Both constitutional provisions require a minimal local activity, which is afforded by the state benefits and services. If such local activity is present, a tax may be imposed in return for the benefits and protections the state provides. In adjudging the sufficiency of said local activity, this Court has endeavored to establish a consistent and rational method of inquiry whereby the practical effect of a challenged tax is examined. Mobil Oil, supra.

Analysis of the nexus requirement, in terms of a tax's practical operation

and its relation to in-state activity, requires consideration on a case-by-case basis since the nexus issue is fact bound. No definitive guideline can be applied in all cases. Therefore, there is no simple test for evaluating the sufficiency of nexus. When examining the propriety of taxes levied on the privilege of selling, such as the tax in this case, this Court has consistently upheld the state tax when the in-state activity was substantial with relation to the establishment and maintenance of sales. See, General Motors Corp. v. Washington, 377 U.S. 436 (1964).

In Standard Pressed Steel Co. v. Department of Revenue of Washington, 419 U.S. 560 (1975), this Court applied nexus requirements, relevant to interstate sales, to a factual situation very similar to the case at bar. According to the

Court, the taxpayer in that case had the following contacts with the State of Washington, the State seeking to impose a business privilege tax:

> "In the years relevant here it had one employee, one Martinson, in Washington who was paid a salary and who operated out of his home near Seattle. He was an engineer whose primary duty was to consult with Boeing regarding its anticipated needs and requirements for aerospace fasteners and to follow up any difficulties in the use of appellant's product after delivery. Martinson was assisted by a group of engineers of appellant who visited Boeing about three days every six weeks, their meetings being arranged by Martinson. Martinson did not take orders from Boeing; they were sent directly to appellant. Orders accepted would be filled and shipment made by common carrier to Boeing direct, all payments being made directly to appellant. Martinson had no office except in his home; he had no secretary; but appellant maintained an answering service in the Seattle area which received calls for Martinson, bills for that service

being sent direct to appellant." Id., 419 U.S. at 561.

After summarizing the taxpayer's contacts, this Court quoted the Washington State Board of Tax Appeals' analysis of the taxpayer's activities. Said Board of Tax Appeals found that the activities of the taxpayer's representative were necessary to the taxpayer:

> "[I]n making it aware of which products Boeing might use, in obtaining the engineering design of those products, in securing the testing of sample products to qualify them for sale to Boeing, in resolving problems of their use after receipt by Boeing, in obtaining and retaining good will and rapport with Boeing personnel, and in keeping the invoicing personnel of appellant up to date on Boeing's list of purchasing specialists or control buyers. * * *" Id., 419 U.S. at 561.

Upon consideration of the foregoing contacts between the State of Washington and

the taxpayer, Standard Pressed Steel, this Court concluded that the question of the sufficiency of in-State activities upon which to base the privilege tax at issue was frivolous. This Court felt that it was obvious that the taxpayer's representative made possible the realization and continuance of valuable contractual relations between the taxpayer and its customer.

While appellant in this case did not have personnel residing within this State, it did have numerous representatives actively engaged within West Virginia in all of the activities engaged in by Standard Pressed Steel's representative in Washington. Appellant's sales representatives made it aware of products its in-State customers might use; made said customers aware of appellant's existing product line and any new products;

made follow-up calls to customers to check product quality and client satisfaction; and obtained and retained good will and rapport with their client's personnel. Given such complete intrusion into the West Virginia market as exhibited by appellant, it is equally frivolous to contend that such activities do not make possible the realization and continuance of valuable contractual relations and do not amount to engaging in the business of selling within West Virginia.

Appellant's sales representatives solicited new business and serviced existing customers within West Virginia. Obviously such activities made possible the realization and continuance of valuable contractual relations or appellant would not have continued to maintain its West Virginia sales force. Appellant

without its in-State solicitation could not have as effectively maintained its existing business or attracted new customers. Appellant's wholesale sales to its West Virginia customers would not exist at their current level but for its in-State activities in furtherance of such sales. Therefore, appellant's in-State business activities, which are essential to the establishment and maintenance of sales and make possible the continuance of valuable contractual relationships, subject it to this State's business and occupation tax consistent with Commerce Clause nexus guidelines.

It was the appellee's position before the West Virginia Supreme Court of Appeals that even though the appellant's activities, solely with regard to the sales in dispute, were more than sufficient to establish the required nexus to

tax, the Court should also consider the overall local business of the appellant as pertinent to the nexus issue. The West Virginia Supreme Court adopted such position and determined that in addition to the business activities strictly associated with the sales at issue, the sufficiency of nexus must be determined in light of a corporation's total in-State activities. The lower court's decision, therefore, refused to examine appellant's sales activities in isolation from its total West Virginia business operation.

The West Virginia Supreme Court recognized the true nature of the Commerce Clause nexus requirement and reviewed the substantial nexus issue in terms of the full scope of appellant's in-State business activities. The lower Court accurately observed that the principles of the unitary business concept were

relevant in reviewing the nexus question in this case. The West Virginia Supreme Court of Appeals' approach to the substantial nexus question is proper in all respects.

In the last several years, this Court, when reviewing the State taxation of an interstate activity, has endeavored to determine the economic realities of a situation and adjudge the validity of a tax's imposition according to practical considerations. Such practical approach is clearly evidenced by this Court's recognition that a business' various aspects are interrelated and that the factors of profitability arise from the operation of the business as a whole. Mobil Oil, supra. This Court has further recognized that it is impossible to precisely determine to what degree one portion of a business aids another and how much the

integration of the business adds to each of its parts. Since every aspect of a unified business contribute to all other aspects, it is misleading to characterize the income of the business as having a single identifiable source. Mobil Oil, supra.

Likewise, when analyzing the benefits one aspect of an integrated business receives from a state, it is misleading to consider that aspect in isolation. The benefits accorded by a state to any portion of a business contribute to the business as a whole and every other aspect of that business is enhanced to some degree. Therefore, when an in-state business activity is evaluated in terms of the amount of local services the state extends to the taxpayer, the total activities of the taxpayer within the taxing state must be considered.

The Commerce Clause's nexus requirement has always been closely associated with the fair relation to services provided by the state, standard. If the state has given anything for which it can ask a return, a state tax passes constitutional muster if there is a minimum connection between its interstate activities and the taxing state, or if there is merely a rational relationship between the income attributed to the state and the intrastate values of its enterprise. Asarco Inc. v. Idaho State Tax Comm'n, 102 S. Ct. 3103 (1982) (Justice O'Connor dissenting). See also: Commonwealth Edison, supra.

In General Motors Corp. v. Washington, 377 U.S. 436 (1964), this Court examined the sufficiency of nexus between the State of Washington and a taxpayer's

local activities in terms of whether the State had exerted its power in proportion to the taxpayer's enjoyment of the opportunities and protection which the State had afforded. In General Motors, supra, the Court identified the issue as follows:

> "A careful analysis of the cases in this field teaches that the validity of the tax rests upon whether the State is exacting a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation.
>
> "For our purposes the decisive issue turns on the operating incidence of the tax. In other words, the question is whether the State has exerted its power in proper proportion to appellant's activities within the State and to appellant's consequent enjoyment of the opportunities and protections which the State has afforded. Where, as in the instant case, the taxing State is not the domiciliary State, we look to the taxpayer's business activities within the State, i.e., the local incidents, to determine if the gross receipts from

> sales therein may be fairly related to those activities. As was said in Wisconsin v. J. C. Penney Co., 311 U.S. 435, 444, 61 S.Ct. 246, 250, 85 L.Ed. 267 (1940), '[t]he simple but controlling question is whether the state has given anything for which it can ask return.'" Id. at 440, 441.

The resolution, in General Motors, supra, of whether there was sufficient local incident to justify the tax on interstate sales, considered all of the taxpayer's in-state business activities and not just those directly associated with the sales at issue. This Court stated:

> "Although mere entry into a State does not take from a corporation the right to continue to do an interstate business with tax immunity, it does not follow that the corporation can channel its operations through such a maze of local connections as does General Motors, and take advantage of its gain on domesticity, and still maintain that same degree of immunity." Id. at 448.

General Motors' activities in the State of Washington were viewed as a "bundle of corporate activity" which was so thoroughly enmeshed in local connections that the entire activities of the taxpayer within the state were relevant in determining the sufficiency of nexus. The Court's recognition that other aspects of General Motors' Washington business activities contributed to the sales at issue was a forerunner of the unitary business concept.

In Asarco, supra, this Court identifies General Motors, supra, as a case involving the unitary business principle. General Motors acknowledged that there was an interrelationship between a business' various facets and that one portion of a business may directly contribute to the successful operation of another. The unitary concept recognizes that all parts

of an integrated business necessarily contribute to all other parts and no one aspect of a business can be viewed in isolation from the operation of the business enterprise as a whole. The appellee submits that, based upon the unitary principle, the nexus issue should be resolved in terms of the full scope of business activities in the state. Only by considering a taxpayer's total activities can an accurate assessment be made of whether the taxpayer is being subject to tax commensurate with the benefits it is receiving from the taxing state.

The West Virginia Supreme Court's refusal to isolate appellant's local activities into compartments and view each compartment separately with regard to the nexus issue is justified by the unitary business principle and by the nature of the appellant's business enterprise.

Appellant is a vertically integrated corporation engaged in every aspect of the production and sale of steel products. As a vertically integrated corporation, it is clear that each of its business operations is part of a functionally integrated enterprise carried on with a common corporate purpose. The mere operation of appellant's business activities on a divisional basis does not establish a disassociation between the divisions. See, Exxon Corp. v. Wisconsin Dept. of Revenue, 447 U.S. 207 (1980).

Appellant's in-State business activities are set out in the Statement of the Case section of this brief. Such activities included, in addition to the sales at issue, the production of coal, which was subsequently used by appellant in the manufacture of steel, and the wholesale and retail sale of metal products from a

South Charleston, West Virginia, office to customers statewide, including the West Virginia Department of Highways. (J.A. 23, 24). The full scope of its West Virginia activities, including its selling activities at issue were a part of its unitary business operation. Therefore, appellant's entire in-State business operation is properly subject to scrutiny in determining whether nexus for any portion thereof exists between the State of West Virginia and the appellant.

The West Virginia Supreme Court correctly applied the Commerce Clause's nexus test to appellant's disputed in-State activities in this case. The "substantial" qualification applied to nexus is designed to simply insure that the measure of the tax reaches income which is rationally related to the intrastate values of the business. Commonwealth

Edison, supra, characterized "substantial" nexus as a minimal connection threshold requirement with the additional limitation that the measure of the tax must be reasonably related to the extent of the taxpayer's contact in the State. In Commonwealth Edison, supra, because the measure of the tax was a percentage of the value of the coal mined in Montana, the mining of coal being the incidence of the tax, the tax was found to be in proper proportion to the appellant's activities within that State. In the instant case, the incidence of West Virginia's privilege tax is selling activities in the State and the measure of the tax is a percentage of the gross receipts of the sales resulting from such activities. Since the tax is levied only upon West Virginia sales, it is in proper proportion to the appellant's activities

in-State. See, Standard Pressed Steel, supra.

Commerce Clause nexus considerations require a local activity of sufficient substance to insure that an out-of-state taxpayer is receiving state services and benefits commensurate with the amount of tax imposed upon its intrastate activities. Since all portions of a unified business are inherently interrelated, the sufficiency of the local activity of the taxpayer should be adjudged according to the full scope of a taxpayer's in-State business operations. When a state tax is imposed on a local incident in relation to the extent of the in-State activity and measured accordingly, Commerce Clause requirements are satisfied. West Virginia's taxation of appellant's in-State selling activities fulfills all of the Commerce Clause's requirements.

Appellant takes a far different approach in analyzing the Commerce Clause's nexus standard. Initially, appellant contends that its sales in issue must be viewed separately from its other in-State business, because the sales are made by divisions of its business which have no other in-State operations. The appellant then submits that although the sales activities, themselves, do have some in-State aspects, such aspects are not "substantial" enough to provide the necessary nexus connection. Appellant justifies its position by reference to the Norton disassociation principle, supra, which it contends requires a determination of Commerce Clause nexus requirements on a transactional basis, that is by examination of each of its business activities separately.

The appellee submits that every component of appellant's argument is wrong. First the practical considerations of the unitary concept recognize that all portions of an integrated business are interrelated, regardless of the internal division of the corporation. A business activity of a unified corporation must be considered in conjunction with other in-State activities of the taxpayer when reviewing the nexus issue. Therefore, appellant's selling activities in West Virginia, clearly being a part of its unitary business, cannot be isolated from its other in-State operations for purposes of determining their nexus.

Secondly, appellant's selling activities in West Virginia, even considered apart from its other business operations, more than satisfy the substantial nexus test of the Commerce Clause. Clearly,

appellant could not have generated the same volume of sales to West Virginia customers without the in-State presence of its representatives. Appellant's sales activities in West Virginia are, therefore, essential to the establishment and maintenance of its sales and make possible the continuance of valuable contractual relationships.

Lastly, appellee submits that appellant's application of the Norton disassociation principle supra, is completely improper. Appellant contends that the Norton disassociation concept requires that its selling activities be viewed separately in determining whether such activities have a "substantial" nexus with the State. The Norton disassociation test, however, as herein discussed, is an outdated due process concept that has no relevance to the Commerce Clause's

"substantial" nexus requirement. The following quote from American Oil, supra, clearly establishes that the disassociation principle is a due process precept:

> "The corporation can, however, exempt itself by a clear showing that there are no in-state activities connected with out-of-state sales. In such instances, the transactions are said to be 'disassociated from the local business,' Norton Co. v. Department of Revenue, supra, at 537, and therefore may not, consistent with due process, be taxed." Id. at 458.

The Norton, supra, decision was rendered at a time when interstate commerce could not be directly subjected to tax. Local aspects of an interstate activity could only be taxed when there was an associated intrastate business which could serve as the incidence of the tax and supply the required local connection. Norton's disassociation standard was designed to determine whether an interstate

activity was sufficiently connected with an intrastate activity of the taxpayer to permit the inclusion of a portion of the interstate receipts in the measure of a local tax. Clearly the Norton disassociation concept, supra, has no pertinence to a Commerce Clause nexus question. Since an interstate activity can now supply its own local connection, its disassociation from other in-State business is irrelevant. Norton's disassociation principle, developed years before permissible direct State taxation of interstate commerce, has no bearing on whether an interstate activity is sufficiently connected with a state so as to allow its direct taxation.

Commerce Clause nexus considerations examine the sufficiency of the in-state portion of an interstate activity to determine whether that state may impose a

tax on said interstate business. An interstate sale is said to be sufficiently connected to a state for taxation if the selling activities within that state are essential to the establishment and maintenance of the sale. Standard Pressed Steel, supra. Appellant's West Virginia selling activities, with respect to the sales at issue, were a decisive factor in its capturing and holding the West Virginia market and their taxation is clearly consistent with Commerce Clause nexus requirements.

Nexus with the taxing state also should be viewed in terms of the tax bearing a fair relation to services provided. In the case of an integrated business such as appellant's all aspects of such business contribute to all other aspects. The sufficiency of the local portion of an interstate activity should

therefore be determined with regard to the full scope of a taxpayer's in-state business operations. Appellant's bundle of corporate activity conducted in West Virginia provides the substantial local connection necessary to insure that the taxation of appellant's in-State selling activities is commensurate with the services and benefits it is receiving from the State of West Virginia.

D. CONCLUSION

West Virginia's business and occupation tax is levied upon the exercise of specified business privileges within the State and only business activities with local aspects are subject to tax. Other states impose tax on a business' apportioned income, regardless the source of such income. The total income of a business is subject to tax by such states in

proportion to the value of the business operations within the state. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 460 (1959)

In states with apportioned taxes, income derived from activities beyond the state's borders is subject to tax if the income was earned from activities related to the taxpayer's activities in the taxing state. Mobil, supra. If the out-of-state income, however, is derived from a discrete business enterprise, a state may not, consistent with the Due Process Clause, subject that income to apportioned taxation. Such taxation by a state of unrelated out-of-state income would constitute the taxation of value earned outside the state's borders and, therefore, would violate the due process minimal connection test, Asarco, supra.

In states with apportioned taxes the question of proper territorial allocations of value is quite relevant to nexus considerations. However, given the inherently local nature of West Virginia's business and occupation tax, the question of said tax's imposition on extraterritorial values, in violation of the Due Process Clause, is frivolous. West Virginia taxes only business activities directly connected with the State and due process nexus is inherent in the subject of the tax.

Appellant's contention that West Virginia's taxation of its interstate selling activities constitutes the taxation of extraterritorial values and as such violates nexus requirements is a total misapplication of constitutional provisions. A tax on the in-state portion of an interstate business when

measured by the gross receipts from the completed activity will always to some degree reflect in such measure values from out-of-state activity. The measure of a tax need not, however, adhere strictly to values associated with the taxing state. The measure of the tax need only be reasonably related to the extent of the taxpayer's contact with the taxing state. A tax's measure is reasonably related to the taxpayer's in-state activities when it is tied to the earnings which the state has made possible. Commonwealth Edison, supra.

In Standard Pressed Steel, supra, this Court approved the use of gross receipts as the measure of a privilege tax on selling activities in a situation almost identical to the present case. This Court looked to the subject of the tax, selling activities conducted in

Washington, and inasmuch as the tax was levied only upon Washington sales, the tax was apportioned exactly to the activities taxed and measured in accordance with the earnings the State had made possible. Likewise, West Virginia's tax is apportioned to appellant's selling activities conducted in the State. Since the tax is measured upon only those receipts from sales to West Virginia customers, the measure of the tax is clearly reasonably related to the extent of the appellant's in-State contact.

In any event, the measure of West Virginia's privilege tax on appellant is not at issue. Appellant's allusion to the State's taxation of extraterritorial value is a purposely vague allegation designed to avoid rational discussion of the constitutional limits of state

taxation, just as its whole position is an attempt to avoid its fair share of the cost of state government. If West Virginia were precluded from taxing the selling activities at issue, what state would levy upon said activities? Appellant's lack of a multiple taxation claim clearly indicates that no other state could tax such selling activities.

This Court should consider not only any potential tax burden on interstate commerce, which would arise from the West Virginia Supreme Court of Appeals' application of the unitary concept to constitutional nexus questions, it should also consider the potential disruption of state privilege tax systems if the Norton disassociation principle, supra, is interpreted to require a state to have substantial nexus with every transaction of every division of a taxpayer carrying on

business in that state. The possibilities for tax avoidance are apparent. Corporations could establish unlimited corporate divisions and require a state to examine each division's activities separately. This would result in not only improper tax avoidance, but would cause extreme difficulties in the administration of taxes. Literally thousands of businesses enter the State's market place and make sales to West Virginia customers. If every transaction of every business had to be analyzed separately, the State's ability to tax its rightful share of an interstate business would be greatly impaired.

The appellee respectfully urges this Court to maintain its practical approach to the resolution of interstate commerce tax issues and affirm the decision below. The West Virginia Supreme Court of

Appeals' decision properly applies constitutional nexus provisions to the appellant's in-State selling operations. The decision correctly concludes that the due process minimal connection necessary is supplied by the in-State presence of the appellant and that Commerce Clause's nexus requirements are satisfied by the appellant's in-State solicitation activities in furtherance of its local sales. The lower Court's use of the unitary concept in adjudging the tax's relation to benefits provided by the State is consistent with this Court's recognition that all portions of an integrated business are interrelated and each portion contributes to all other aspects. This Court should maintain its general approval of the taxation of interstate sales by the state of destination, when such state

has a sufficient connection with the taxpayer's selling activities.

II.

THE IMPOSITION OF THE WEST VIRGINIA BUSINESS AND OCCUPATION TAX UPON APPELLANT'S BUSINESS ACTIVITY OF MAKING WHOLESALE SALES IN WEST VIRGINIA DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE.

Appellant asserts that the taxation by West Virginia of its wholesale selling activities discriminates against interstate commerce. The alleged basis of discrimination is the interplay between Sections 2, 2b, and 2c, of Chapter 11, Article 13, of the West Virginia Code of 1931, as amended. Specifically, the fifth paragraph of Code 11-13-2 provides that a person subject to the manufacturing privilege tax provided by Code 11-13-2b is not also subject to the wholesale sales business tax provided by Code

11-13-2c. Appellant contends that since an out-of-State manufacturer has to pay the wholesale sales tax under Code 11-13-2c, while the in-State manufacturer does not, this is discrimination against interstate commerce that violates the Commerce Clause. Appellee submits that the tax in question is not discriminatory in this manner.

First, the standard announced by this Court in determining if a state tax violates the Commerce Clause for being discriminatory is: "No state may, consistent with the Commerce Clause, 'impose a tax which discriminates against interstate commerce * * * by providing a direct commercial advantage to local business.'" Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 329 (1977). Further, when determining whether a state tax is discriminatory, the tax

must be assessed in light of its actual effect and considered in conjunction with other provisions of a state's taxation scheme. Maryland v. Louisiana, 451 U.S. 725 (1981). This principle was succinctly stated in Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64 (1963), as follows: "proper analysis must take 'the whole scheme of taxation into account,'" and "equality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions."

Accordingly, the fact that a manufacturer subject to the West Virginia business and occupation tax on manufacturing (Code 11-13-2b) is not subject to the tax on wholesale sales does not amount to discrimination against interstate commerce. A West Virginia manufacturer is exempt from the wholesale sales

tax, imposed at the rate of .27 percent, only if he has paid the tax on manufacturing at the rather substantial rate of .88 percent. Given these different tax rates, it cannot be said that an in-State manufacturer who sells its product in West Virginia is going untaxed while an out-of-State manufacturer is carrying an unfair share of the tax burden. The Legislature saw fit to tax manufacturing at a higher rate and then allow the manufacturer to sell its product at the wholesale level tax free. If the in-State manufacturer sells West Virginia manufactured products at the retail level, or any other person sells those products at wholesale, such sales are subject to taxation. Thus, the only time that a wholesale sale of West Virginia manufactured products goes tax free is when it is sold by a manufacturer who has paid tax on the manufacturing privilege at a much higher

rate. This is an entirely reasonable system of taxation of the manufacture and sale of products in West Virginia that does not discriminate against interstate commerce.

This Court has upheld similar systems of state taxation. In Caskey Baking Co. v. Virginia, 313 U.S. 117 (1941), the tax complained of there was an annual license tax of One Hundred Dollars ($100.00) imposed for each vehicle used in the business of peddling goods or merchandise. The license tax did not apply to local manufacturers that paid a tax on their capital or local distributors having a fixed place of business in the state who paid a state tax on their purchases. Thus, the practical effect of the statute was that the vehicles of local manufacturers and distributors were exempt from the license tax, while the

vehicles of vendors domiciled out of state were subject to the tax. The appellant in the case was a West Virginia bakery that sent its trucks into Virginia to sell bakery goods. This Court held the license tax to be constitutional, upon a finding that the tax in question was but one portion of a reasonable comprehensive scheme of taxation. Also, the Court held that while local manufacturers and distributors were not subject to the tax on their vehicles, they paid other state taxes which the state deemed sufficient to cover all of their activities, including the vending of goods. The Court in its decision also noted if the license tax was not allowed, the out-of-state vendors would be the only vendors in Virginia to escape some form of taxation.

Likewise, in the case of Alaska v. Arctic Maid, 366 U.S. 199 (1961), cited by the lower court, the tax involved was a 4 percent occupation tax on freezer ships processing fish taken from Alaskan waters. The taxpayer there used freezer ships for the taking and preservation of salmon along Alaska's shores. After freezing the fish, the freezer ship would return to the State of Washington where the fish were canned. The taxpayer claimed discrimination, since fish that were caught and canned in Alaska were not subject to the 4 percent tax. This Court looked at Alaska's entire scheme of taxation and upheld the tax, saying:

> "It is claimed that there was no tax on salmon caught and frozen in Alaska and destined for canning in Alaska and that therefore this law is discriminatory against freezer ships. Alaskan canneries, however, paid a six-percent tax on the value of salmon obtained for

canning; and local fish processors, which sell to the fresh-frozen consumer market, paid a one-percent tax. The freezer ships do not compete with those who freeze fish for the retail market. The freezer ships take their catches south for canning. Their competitors are the Alaskan canners; and we know from the record that fish canned locally usually are not frozen. When we look at the tax laid on local canners and those laid on 'freezer ships,' there is no discrimination in favor of the former and against the latter. For no matter how the tax on 'freezer ships' is computed, it did not exceed the six-percent tax on the local canners. * * * If there is a difference between the taxes imposed on these freezer ships and the taxes imposed on their competitors, they are not so 'palpably disproportionate' (International Harvester Co. v. Evatt, 329 US 416, 422, 91 L Ed 390, 395, 67 S Ct 435) as to run afoul of the Commerce Clause. No 'iron rule of equality' between taxes laid by a State on different types of business is necessary." (Citations omitted.) 366 U.S. at 204 - 205.

See also, Gregg Dyeing Co. v. Query, 286 U.S. 472 (1932).

Appellant's reliance on Columbia Steel Co. v. State, 30 Wash. 2d 658, 192 P.2d. 976 (1948), is thoroughly misplaced. Columbia Steel did involve an exemption in the State of Washington's privilege tax system which was virtually identical to the exemption in this case, and said exemption was found to discriminate against interstate commerce. However, the Washington Supreme Court in that case did not attempt to analyze the issue in terms of the actual effect of the exemption or consider the exemption in conjunction with the State's other tax provisions. The Court clearly invalidated the tax on purely semantic grounds without consideration of the practical economic realities involved.

The semantic approach of the Washington Court to the discrimination issue is illustrated in its later decision in

B. F. Goodrich Co. v. State, 38 Wash. 2d 663, 231 P.2d 325 (1951). In that case the Court reviewed the Washington privilege tax system as amended in response to the Columbia Steel, supra, decision. The Court stated:

> As amended in 1943, this statute provided that persons taxable as manufacturers should not be taxable as wholesalers. Rem. Supp.1943, § 8370-6. As so written, we held that it marked an unconstitutional discrimination against interstate commerce, in that it levied a tax upon wholesale activities of those engaged in such commerce, while exempting those who performed the same taxable act, to wit, the sale at wholesale, if they manufactured in the state of Washington. Columbia Steel Co. v. State, 30 Wash.2d 658, 192 P.2d 976; Weyerhaeuser Sales Co. v. State Tax Commission, 30 Wash.2d 947, 192 P.2d 979. In an attempt to cure this defect, the legislature in its extraordinary session of 1950, rewrote the statute in the form quoted above, so that it now lays a tax equally upon all those selling at wholesale within the state, but further provides that those who are taxed as wholesalers

> shall not be taxed as manufacturers. The procedure for exemption of those who perform both the taxable acts of manufacture and sale has thus been exactly reversed; the local manufacturer-wholesaler, instead of being exempt from tax as a wholesaler, is instead exempt as a manufacturer.
>
> Although respondents plainly regard this change as purely verbal (it may well be; but the cases in this field often turn, unfortunately, on just such verbal niceties), they also assert that it has rendered the statute invulnerable to any attack that an out-of-state manufacturer who sells his product within the state may direct against it on the ground that it unconstitutionally discriminates against him. With this position we agree. 231 P.2d at 328 (Emphasis supplied.)

The Washington Supreme Court's recognition that the decision turned not on the practical effects of the tax system but on verbal niceties demonstrates its improper analysis of the issue in terms of legal abstraction rather than dollars and cents. This Court's recent opinion

in Washington v. United States, __U.S.__, 103 S.Ct. 1344 (1983) reiterates that a determination of whether a tax is discriminatory should be made with regard to the economic burdens that result. West Virginia's privilege tax system and the exemptions involved therein should be adjudged with respect to its economic consequences and not according to hypothetical allegations.

Therefore, although in-State manufacturers do not pay under the wholesale sales classification of the business and occupation tax, they nevertheless must pay a tax, at a much higher rate, on the entire manufacturing privilege. Given the tax burden placed on the in-State manufacturer, it cannot be said that appellant pays a disproportionate amount of tax on its in-State sales.

The exact issue presented in this case has been previously presented to this Court in Columbia Gas Transmission Corporation v. Herschel H. Rose, III, Tax Commissioner of West Virginia, 103 S. Ct. 32 (1982). In that case, the identical interplay of the statutes at issue was challenged. The fifth paragraph of Code 11-13-2 exempts from the payment of the State's wholesale sales privilege tax not only those selling products whose manufacture was subject to the State's manufacturing privilege tax but also the sale of natural resource products whose production was subject to the State's production privilege tax. Columbia Gas as an out-of-State producer of natural gas, claimed that the taxation of its in-State wholesale sales, in light of the exemption accorded in-State producers, acted as a discrimination against interstate commerce. This Court's dismissal of the

Columbia Gas appeal should serve as controlling precedent in this case.

CONCLUSIONS

For the foregoing reasons, appellee submits that the application of West Virginia's privilege tax to appellant's in-State selling activities is constitutional in all respects. Therefore, the decision of the West Virginia Supreme Court of Appeals is clearly correct and should be affirmed.

Respectfully submitted,

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